# *Heileman Brewing Co. Inc. v. Joseph Oat Corporation*: Defining the Perimeters of Judicial Involvement in the Settlement Process

> Should you be called upon to function as a judge, do not be like the legal advisers who offer to place their juridical knowledge at the service of the litigating parties. . . . [Y]ou must remain silent and abstain from interference in the arguments . . . . Do not by so much as a gesture seek to influence either prosecution or defense.
> - Commentary on the Mishnah (Pirke Avot)[1]

> [T]he judge should actively and firmly (but not coercively) seek to settle every case on his docket. . . . I suggest that no more than five per cent of each year's civil terminations should result from fully tried cases. The other ninety-five percent, if not settled by counsel themselves, should be settled with the judge's active intervention.
> - Judge Frederick Lacey[2]

## I. INTRODUCTION

A blindfolded female figure, draped in robes and carrying scales and a sword, adorns the courtrooms of the United States. Her familiar shape has long endured as this nation's symbol of justice, signifying fairness and impartiality to all. Unapproachable and incorruptible, she illustrates the physical and psychological distance between judge and litigants. Her scales represent the obligation to balance claims fairly and evenhandedly, while her sword reflects the power to enforce decisions without sympathy or compromise. Most importantly, her blindfold represents protection from distraction and from information which could bias or corrupt.[3] In accord with the principles behind this judicial symbol, the United States' judicial system developed as an adversary system, bestowing upon litigants the power to control case preparation while restricting the judiciary to a neutral and relatively passive role.

> The central precept of adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information from which a neutral and passive deci-

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1. Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982)(quoting Hirsch commentary to CHAPTER OF THE FATHERS (PIRKE AVOT) 12 (S.R. Hirsch trans. & comm., G. Hirschler trans. 1967) (emphasis omitted).

2. Galanter, *". . . A Settlement Judge, not a Trial Judge:" Judicial Mediation in the United States*, 12 J.L. & SOC'Y 1, 4 (1985).

3. Resnik, *supra* note 1, at 383.

sion maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society.[4]

Pursuant to adversary theory, a neutral and passive fact finder resolves disputes based upon evidence furnished by contending parties during the course of trial. Each actor in this traditional system plays a particular role, fulfilling a separate and distinct function. The parties to the action control case preparation and presentation. Each party's lawyer gathers all potentially necessary information during out-of-court pretrial discovery, carefully preparing the legal and factual issues which may arise at trial. If the parties do not settle, the lawyers select and present proofs at trial.[5] The judge, who may also act as fact finder, presides at the trial, directing its progression and weighing evidence and legal arguments. The fact finder (either judge or jury) listens passively to the evidence and testimony submitted by the parties, refraining from arriving at a judgment until the conclusion of the trial. To ensure the system's proper functioning, the fact finder and judge (if not one and the same) must abstain from participating either in the collection of evidence or in the parties' settlement of the case. According to adversary theory, any fact finder or judge straying from this passive role risks prematurely committing himself to one version of the facts, thereby losing the impartiality essential to the system's operation.[6] Each actor executes his role pursuant to an elaborate set of rules governing pretrial and posttrial periods (rules of procedure), the trial itself (rules of evidence), and the behavior of counsel (rules of ethics). These rules seek to preserve the fact finder's neutrality and passivity, enhance the attorneys' power to control the fact presentation process, and confine the judge's authority to manage the proceedings.[7]

In contrast to our lawyer-dominated judicial system, the Continental system of justice, as exemplified by West German civil procedure, places fundamental emphasis on active inquiry by the judge to uncover the truth.[8] While the lawyer still plays an important role in the Continental system by overseeing the work of the court, formulating the clients' position through legal argument, and nominating lines of factual inquiry, the court determines the sequence of factual investigation and examines the witnesses unfettered by any elaborate set of rules of evidence.[9] Moreover, the Continental system does not distinguish between the pretrial and

4. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714 (1983).
5. *Id.* at 715.
6. *Id.* at 714-15.
7. *Id.* at 716.
8. *Id.* at 724.
9. Langbein, *Trashing the German Advantage*, 82 NW. U.L. REV. 763, 763 (1988).

trial stages of litigation. The Continental court investigates and adjudicates in a series of discontinuous hearings, holding as many as necessary to settle or decide the case. As the case progresses through these hearings, the judge actively discusses the proceedings with the litigants, sometimes indicating provisional views of the likely outcome and, thus, encouraging settlement.[10]

Disgruntled with long court delays, expanding volumes of litigation, and skyrocketing attorney and litigation expenses, increasing numbers of scholars, judges, and even lawyers advocate abandonment of our traditional adversary system in favor of alternative methods of dispute resolution which incorporate many of the Continental system's characteristics.[11] The various methods of alternative dispute resolution have achieved different degrees of acceptance and success, repeatedly receding from and emerging into the forefront of controversy. Much of today's controversy revolves around the technique of "managerial judging."[12]

As scholars focus less on the need to foster judicial decisions on the merits and more on the desirability of limiting the use of the courts, the roles adhered to in our traditional system blur together. The physical and psychological distance between judge and litigants narrows as judges discard their disinterested poses and pursue more active stances. Today's judges not only act as referees, but also meet with the parties in chambers to encourage settlement and to supervise case preparation. "[J]udges remove their blindfolds and become part of the saga themselves."[13] The judge of today plays a critical role in shaping litigation and influencing results. Proponents of alternative dispute resolution (ADR) contend that managerial judging and other movements away from the adversary system, such as neutral expert witnesses, discovery scheduling, and court-initiated limits on discovery, decrease the costs of litigation, minimize the delay associated with our traditional system, and reduce the amount of litigation initiated, achieving the "just, speedy, and inexpensive determination of every action."[14] Yet, while some persons applaud the ad hoc efforts of judges to quicken resolution of cases and to persuade litigants to settle, others question the legitimacy of judicial

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10. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826-32 (1985).

11. *Id.* at 858-66.

12. *See generally* Resnik, *supra* note 1. The term "managerial judging," as coined by Judith Resnik, refers to the active participation of the judiciary in litigation, including closer judicial supervision of discovery and other pretrial activities and judicial involvement in the settlement process.

13. Resnik, *supra* note 1, at 408.

14. *See* Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 771 (1981) (quoting FED. R. CIV. P. 1).

dominance and involvement in both case preparation and the traditionally private settlement process.[15]

## II. History of Judicial Participation in the Settlement Process

The two quotations introducing this Note reflect the evolution of the judge from "reticent dispenser of justice merely presiding over trial proceedings" to "active case manager involved in the formulation and direction of civil litigation."[16] The beginning of this evolutionary process dates back to 1929 when the Circuit Court of Wayne County, Michigan, finding its docket backlogged forty-five months, instituted a system of compulsory pretrial conferences between the lawyers and a judge to promote settlement. This system of mandatory conferences reduced the wait for a trial in Wayne County, Michigan to between twelve and fifteen months.[17] Spurred by the promising results of the Michigan "experiment," courts in a number of cities adopted the system with favorable results.[18] The growing popularity and use of this pretrial system culminated in the adoption of Rule 16 of the Federal Rules of Civil Procedure, creating federal pretrial procedure.[19]

The drafters of Rule 16 did not intend to drastically change the judge's role in litigation. The Federal Rules envisioned a lawyer-controlled pretrial process subject to neutral judicial oversight.[20] In fact, the drafters of Rule 16 intentionally omitted settlement from the goals of pretrial proceedings. They did not feel that settlement negotiations should occur during pretrial conference.[21]

Despite the drafters' intentions, discussions of settlement frequently entered the pretrial conference under the auspices of Rule 16(c)(11). This subpart of Rule 16 allows judges to consider during pretrial conference those "matters as may aid in the disposition of an action."[22] Such judicial intervention received increasing support, resulting in the amend-

15. *See, e.g.*, Resnik, *supra* note 1; Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). Fiss argues that ADR possesses the same flaws as plea bargaining in the criminal case: coercion, imbalance of power, and miscarriages of justice.

16. Rayner, *Judicial Authority in the Settlement of Federal Civil Cases*, 42 WASH. & LEE L. REV. 171, 171 (1985).

17. Oesterle, *Trial Judges in Settlement Discussions: Mediators or Hagglers?*, 9 CORNELL L.F. 7, 7 (1982).

18. *Id.*

19. *Id.*

20. Galanter, *supra* note 2, at 7.

21. Oesterle, *supra* note 17, 7 (citing Clark, *Objectives of Pre-trial Procedures*, 17 OHIO ST. L.J. 163, 167 (1956)).

22. FED. R. CIV. P. 16(c)(11).

ment of Rule 16 in 1983 to expressly include the facilitation of settlement as a purpose of the pretrial conference.[23] The advisory committee noted that the amendment gave formal recognition to a commonplace practice.[24] Recent studies lend credence to the committee's observations, illustrating the extent to which such intervention occurs. In a nationwide survey of trial judges only 21.8 percent of 2,545 responding judges described their philosophy as noninterventionist.[25]

## III. HEILMAN BREWING CO. V. JOSEPH OAT CORP.

The technique of managerial judging, specifically judicial involvement in the settlement process, gives rise to many legal battles. *Heileman Brewing Co. v. Joseph Oat Corporation*[26] represents one such conflict, questioning the scope of the judge's power to order settlement conferences. The origins of the suit trace back to 1980 when Joseph Oat Corporation supplied a pretreatment system for a waste water treatment plant built by RME Associates for G. Heileman Brewing Company. The system allegedly failed to work as expected, resulting in a number of disputes between Joseph Oat, RME, and Heileman. N.V. Centrale Suicker Maatschappi (Centrale), the Dutch corporation responsible for developing the pretreatment system and naming Joseph Oat as its exclusive licensee in the United States, was also a party to the dispute. Joseph Oat sued both Heileman and RME in federal district court.[27] RME counterclaimed and joined Centrale as a third-party defendant. Although Joseph Oat settled its difference with Heileman and dismissed its claims against RME, RME's claims against Joseph Oat and Centrale remained. The district court set RME's claims for trial in January, 1985.[28] RME, Centrale, and Heileman pursued settlement discussions. Joseph Oat, however, refused to take part in the proceedings, disclaiming any desire to settle. The magistrate, whom the district court designated to hear pretrial matters, subsequently postponed the trial and ordered the parties to attend a settlement conference conducted in his presence. The court order required each party to send to such conference *not only*

23. FED. R. CIV. P. 16(c).

24. Galanter, *supra* note 2, at 7 (quoting advisory committee's note to Rule 16).

25. *Id.*

26. 107 F.R.D. 275 (W.D. Wis. 1985), *rev'd*, 848 F.2d 1415 (7th Cir. 1988), *aff'd en banc*, 871 F.2d 648 (7th Cir. 1989).

27. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d 1415, 1417 (7th Cir. 1988), *rev'd en banc*, 871 F.2d 648 (7th Cir. 1989).

28. *Id.*

*its counsel, but also a representative possessing full settlement authority.*[29]

Despite the court order, Joseph Oat sent only its counsel to the settlement proceeding, declining to send a party representative with full settlement authority. Joseph Oat's counsel informed the presiding magistrate that he lacked requisite authority to agree to a settlement offer. The magistrate excluded Joseph Oat's counsel from the conference because he lacked such settlement authority. Following that day's discussions, the magistrate continued the conference in the presence of all parties involved in the litigation, including Joseph Oat's counsel. The magistrate again ordered each party, including Joseph Oat's and RME's liability insurers, to send a representative possessing full settlement authority to the conference.[30]

Joseph Oat's counsel and its outside corporate counsel discussed the order in ensuing phone conversations, apparently interpreting it to require that someone other than trial counsel attend the settlement conferences. In the meantime, Joseph Oat's liability insurer, National Union, informed Joseph Oat of its refusal both to pay any money for settlement and to send a representative to the settlement conference. Joseph Oat's outside corporate counsel, therefore, deemed any settlement payment by Joseph Oat an impossibility. Outside counsel requested that trial counsel contact the magistrate and inquire if, in light of the circumstances, Joseph Oat still needed to send someone from Philadelphia, Pennsylvania to Madison, Wisconsin to attend the conference. Despite knowledge of Joseph Oat's predicament, the magistrate reiterated his earlier order, refusing to bend even in light of the exigent circumstances.[31]

In view of the magistrate's reply, outside corporate counsel accompanied Joseph Oat's trial counsel to the settlement conferences in Madison so as to comply with the magistrate's order. Like trial counsel, however, Joseph Oat's outside corporate counsel lacked the authority to offer or to agree to any settlement payment on the behalf of Joseph Oat. In fact, Joseph Oat instructed its trial counsel to inform the court that the corporation would not pay any money to settle the dispute.[32]

The magistrate deemed Joseph Oat's failure to send a representative other than trial or outside corporate counsel, both of whom lacked the mandated full settlement authority, a violation of his order. He required Joseph Oat to show cause why the corporation should not be subject to

29. *Id.*
30. *Id.*
31. *Id.* at 1417-18.
32. *Id.* at 1418.

sanction under Federal Rule of Civil Procedure 16(f).[33] After a hearing on the order to show cause, the magistrate sanctioned Joseph Oat and its insurer, ordering them to pay RME, RME's liability insurer, Centrale, and Heileman the costs, including attorneys' fees, incurred in attending the conference.[34]

Joseph Oat subsequently petitioned the district court, asking for reconsideration of the magistrate's order. The district judge affirmed the magistrate's decision, holding that Federal Rule of Civil Procedure 16[35] authorized a district court to order parties to send a representative with full settlement authority to settlement conferences. The judge further declared that Joseph Oat waived any objection to the magistrate's order by ignoring the order instead of attempting to have the district court vacate or modify it prior to the date scheduled for the conference.[36]

Thereafter, Joseph Oat appealed the district court's order affirming the sanctions leveled by the magistrate. The Court of Appeals for the Seventh Circuit ruled that the magistrate's order fell outside the bounds of judicial authority under Rule 16. In overturning the magistrate's order, the court considered the applicable federal rules, relevant case law, and policy considerations. The court concluded that sanctioning a party for "bad faith" simply because the party's attorney proclaims at the initiation of the settlement conference that his client refuses to pay any

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33. *Id.*

34. *See* Heileman Brewing Co. v. Joseph Oat Corp., 107 F.R.D. 275, 277-83.

35. FED. R. CIV. P. 16:

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

. . .

(5) facilitating the settlement of the case.

. . .

(c) Subjects to be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to

. . .

(7) the possibility of settlement or the use of extra judicial procedures to resolve the dispute;

. . .

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just . . . . In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees . . . .

36. 107 F.R.D. 275, 277.

amount to settle, wanting instead its day in court, is inconsistent with the tenor and policy of Rule 16.[37]

The Seventh Circuit's panel decision, however, did not terminate the litigation spawned by the magistrate's order. Instead, the appeals court sitting en banc reversed the panel's ruling in a 6-5 decision. Citing to a district court's inherent powers to control cases and manage its own affairs, the en banc majority held that the magistrate possessed the authority to order a represented party to appear at a settlement conference in order to promote the "just, speedy, and inexpensive determination"[38] of the action. According to the court, Rule 16 does not alter this authority because it provides direction to the district court only with respect to trial advocates, attorneys of record, and pro se litigants, not represented parties.[39]

## IV. THE DISTRICT COURTS' INHERENT POWERS

In addition to those powers granted by the Federal Rules of Civil Procedure, the district courts possess certain inherent powers.[40] These powers, as traditionally recognized by the Supreme Court and other appellate courts,[41] enable the district courts to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[42] The en banc majority in *Heileman* predicated its approval of the magistrate's action upon these inherent powers. According to the majority, the magistrate's actions merely represented another application of the district courts' "inherent authority to preserve the efficiency and more importantly the integrity of the judicial process."[43]

As recognized by the majority, these inherent powers are not without limitations.[44] Pursuant to Federal Rule of Civil Procedure 83, a district court may not exercise its inherent powers in any manner which is incon-

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37. 848 F.2d 1415, 1418-22.

38. FED. R. CIV. P. 1 provides: "These rules govern the procedure in the United States district courts in all suits . . . . They shall be construed to secure the just, speedy, and inexpensive determination of every action."

39. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 648-57 (7th Cir. 1989).

40. Rayner, *supra* note 16, at 179 (citing United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812)).

41. *See* Link v. Wabash R.R., 370 U.S. 626 (1962). In *Link*, the Supreme Court acknowledged that the Federal Rules of Civil Procedure do not provide a definitive index of the district courts' powers and were not intended to be the exclusive authority for the district courts' actions. *See also* Brockton Sav. Bank v. Pete, Marwick, Mitchell & Co., 771 F.2d 5, 11 (1st Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986).

42. 871 F.2d 648, 651 (quoting Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962)).

43. 871 F.2d 648, 652.

44. *Id.*

sistent with the Federal Rules of Civil Procedure.[45] As noted by Judge Coffey in his dissent, the Supreme Court recently stressed this restriction on the district courts' use of their inherent powers.[46] In *Bank of Nova Scotia v. United States*,[47] the Supreme Court ruled that a district court may not employ its inherent powers (labeled supervisory powers by the Supreme Court) in a manner that contravenes the balance struck by federal rules of procedure between the varying societal interests.[48] While this case dealt with a district court's use of inherent powers in the criminal setting (the judge's use of inherent powers to dismiss an indictment based upon "harmless error" in a grand jury proceeding),[49] the Supreme Court's ruling seems equally applicable in the civil setting in light of the dictates of Rule 83. This requirement of consistency would appear to limit the magistrate's power to direct the settlement process by requiring his actions to conform to Rule 16, which addresses the judge's role in settlement. Like the procedural rule in question in *Bank of Nova Scotia*, Rule 16 reflects an endeavor to balance different societal interests — judicial efficiency and the rights of individual litigants.[50] The appellate courts should not allow the district courts to circumvent this carefully achieved balance through the application of their inherent powers.

The en banc majority concluded that the magistrate's actions accorded with the dictates of Rule 16. Noting that Rule 16 refers only to the participation of trial advocates, attorneys of record, and pro se litigants in pretrial proceedings, the court nevertheless stated that the omission of represented parties from the language of Rule 16 did not give rise to the negative implication that no represented party may be directed to appear. The court further ruled that the magistrate's actions conformed with and aided in accomplishing the purpose and intent of Rule 16 when construed liberally under Rule 1 to secure the just and expedient determination of every action.[51] Under this analysis, the magistrate's use of the court's inherent powers to order represented parties to attend pretrial

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45. FED. R. CIV. P. 83 provides: "In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."

46. 871 F.2d 648, 659 (Coffey, J., dissenting) (quoting Thomas v. Arn, 474 U.S. 140, 148 (1985)).

47. 108 S. Ct. 2369 (1988).

48. Bank of Nova Scotia v. United States, 108 S. Ct. 2369, 2374 (1988).

49. *Id.* at 2372-73.

50. *See* Strandell v. Jackson County, 838 F.2d 884, 886 (7th Cir. 1987) (quoting S. REP. No. 1744, 85th Cong., 2d Sess., *reprinted in* 1985 U.S. CODE CONG. ADMIN. NEWS 3023, 3026). The Federal Rules of Civil Procedure, including Rule 16, "are the product of a careful process of study and reflection designed to take 'due cognizance of both the need for expedition of cases and the protection of individual rights.' "

51. 871 F.2d 648, 652.

conferences would not contradict the provisions of Rule 16. The majority's reasoning, however, contains many defects.

## V. The Limits of Federal Rule 16

### A. *Federal Rule 16(c): Exploration of the Possibility of Settlement*

Federal Rule of Civil Procedure 16 bestows upon a court the general authority to establish pretrial procedures. Under Rule 16, a court can require litigants to participate in a pretrial conference to consider the orderly administration of the suit, and, as amended in 1983, to explore the possibility of settlement.[52] As the *Heileman* panel decision notes, Rule 16(c) does no more than recognize the possibility of settlement as an appropriate subject of discussion at pretrial conferences.[53] The Rule provides that the participants in pretrial conferences may consider the possibility of settlement. Rule 16(c), however, gives no directive as to who these participants may or must be. The magistrate in *Heileman* relied upon Rule 16 as a warrant for his actions. Yet, Rule 16(c) does not explicitly confer upon a judge the power to require that a party representative bearing full settlement authority attend the pretrial conference.[54] In fact, subpart (c) of Rule 16 fails to provide any guidance as to whom the court may require to appear at the conference.

### B. *Federal Rule 16(a): Delineation of the Judge's Control*

Although Rule 16(c) provides no definition of "participant," Rule 16(a) does delineate the bounds of a district court's discretion in determining whom to order to appear at a pretrial meeting. As amended, Rule 16(a) provides that "the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial . . . ."[55] Rule 16(a) thereby only grants the district courts power to require trial advocates — attorneys of record and pro se litigants — to attend the pretrial conference. Under the Rule's language, the court's authority does not extend to ordering the members of a represented party to attend such conferences. Assuming the subsections of Rule 16 are consistent with each other, the definition of "participants" in Rule 16(c) encompasses only the "forced" attend-

52. Fed. R. Civ. P. 16(c)(7).
53. 848 F.2d 1415, 1421.
54. *Id.* at 1420-21
55. Fed. R. Civ. P. 16(a).

ance of an attorney of a represented party or the member(s) of an unrepresented party.[56] In light of this wording, therefore, Rule 16 does not appear to authorize the magistrate's actions. In fact, the specificity of the language appears to limit the magistrate's powers in pretrial conferences to ordering the attendance of only attorneys of record and unrepresented parties. Had the drafters of the rules intended or desired to extend the court's reach under Rule 16(c) to represented parties, they would have expressly provided so.[57] In view of the above analysis, the magistrate in *Heileman* apparently overstepped the limits of his discretion in ordering the attendance of both counsel and a party representative with full settlement authority.

The en banc majority, as previously noted, did not perceive the Rule's language as creating words of limitation. According to the majority, the omission of represented parties from the Rule's coverage does not give rise to the negative implication that no represented party may be directed to appear.[58] The majority, however, seemingly reaches this conclusion in a vacuum as it gives no consideration to the remainder of the Rule's language or to the history of the Rule. As noted by the majority in the panel decision[59] and by Judge Manion in his dissent to the en banc opinion,[60] Rule 16 repeatedly distinguishes between represented and unrepresented parties. This distinction is consistent with a litigant's statutory right to representation by an attorney, as well as with the attorney's traditional role in litigation.[61] This distinction as echoed throughout Rule 16, and, as noted below, particularly in its sanctions provision, suggests the opposite conclusion of that reached by the en banc majority. If the Rule's drafters did not intend to limit the district courts' powers to ordering only attorneys of record and pro se litigants to attend pretrial conferences, they surely would not have taken such pains to maintain a rigid distinction between represented parties and unrepresented parties.

The conclusion reached by the en banc majority also ignores the history of the Rule. Prior to 1983, Rule 16 applied only to attorneys of record. Rule 16, as originally drafted, only provided district court judges with the authority to require attorneys for represented parties to attend pretrial conferences.[62] After careful consideration, the Supreme Court and Congress amended the Rule in 1983 to achieve increased judicial efficiency. Yet, the Court and Congress only extended the district courts'

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56. *See* FED. R. CIV. P. 16.
57. 848 F.2d 1415, 1421.
58. 871 F.2d 648, 652.
59. 848 F.2d 1415, 1420-21.
60. 871 F.2d 648, 666-67 (Manion, J., dissenting).
61. *Id.* at 667 (Manion, J., dissenting).
62. *Id.* at 659 (Coffey, J., dissenting).

powers to the extent of granting them the authority to compel unrepresented parties to attend pretrial conferences and of officially recognizing settlement as a legitimate topic of discussion at such conferences.[63] The amendment stopped short of bestowing upon these courts the "broad and sweeping" authority to require represented parties to attend pretrial conferences.[64] The clear import of this omission is a conscious decision to limit the courts' powers to compelling only trial advocates — attorneys of record and pro se litigants — to attend pretrial conferences. If the drafters intended to allow the district courts to compel the attendance of represented parties at pretrial conferences, they certainly would have made such an intention clear when amending the Rule, rather than leaving such interpretation to the courts. The majority offers no explanation of why the drafters employed the language that they did, rather than explicitly granting the courts the power to compel represented parties to attend.[65]

The advisory committee's notes evidence no intention to grant the district courts the power to compel represented parties to attend pretrial conferences. It seems likely that if the drafters intended to confer such broad authority on the judge, there would be some indication of it in their notes. One, therefore, can ascribe this omission either to an error, oversight on the part of the drafters, or to an intentional limitation of the court's power.[66] The immensity of such an oversight makes it difficult to attribute the omission to sloppy draftsmanship. An error of such magnitude would be extremely difficult to overlook. The drafters' failure to provide the courts with the power to order represented parties to the settlement table, therefore, appears to represent a conscious choice on the part of the drafters.

### C. *Federal Rule 16(f): The Court's Sanctioning Power*

Neither Rule 16(a) nor Rule 16(c) grants the district court the power to level sanctions for failing to comply with its pretrial orders. The authority to sanction uncooperative parties lies in Rule 16(f). Rule 16(f) provides:

> If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to par-

63. *Id.* at 660 (Coffey, J., dissenting).
64. *Id.*
65. *Id.* at 668 (Manion, J., dissenting).
66. *Id.*

> ticipate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just . . . .[67]

Rule 16(f) further mandates that the judge order the party or the party's attorney or both to pay any reasonable expenses, including attorneys' fees incurred by other parties to the action as a result of their noncompliance with pretrial orders, either in lieu of or in addition to any other sanction. Although, as addressed by the majority in the *Heileman* panel decision,[68] the district court for the Eastern District of Kentucky interpreted Rule 16(f) in *Lockhart v. Patel*[69] to allow the district court to order represented parties to attend settlement conferences, this interpretation appears faulty.

The *Lockhart* court's reading of Rule 16(f) seems plausible, even correct, when Rule 16(f) is read in isolation, but not when Rule 16 is read as a whole. Rule 16(f) represents only a single division of the whole Rule — the portion conferring upon the court the formal authority to sanction persons for not following its pretrial directives issued pursuant to the earlier subsections. Section 16(f) does not expand the court's authority under section 16(a) or section 16(c). If, by adding section 16(f), the drafters meant to provide the court with the additional authority to order a represented party to attend settlement conferences, they would have amended section 16(a) to apply to attorneys, unrepresented parties, and represented parties. In fact, as the panel decision in *Heileman* argues, section 16(f) empowers the court to level sanctions when "no appearance is made *on behalf of* a party,"[70] not if a party fails to appear. Under the plain meaning of this language, the court could sanction a party only if that party sent no representative. It could not sanction the party which sent its attorney on its behalf.

The language of section 16(f), when read in conjunction with the other sections of the Rule, authorizes sanctions in two situations. First, a district court may sanction an unrepresented party or the attorney for a represented party who does not appear at a settlement conference. Second, the court may in appropriate situations sanction a represented party whose attorney fails to appear despite the client's directive, as the client is bound by his lawyer's actions.[71] As the Supreme Court of the United States remarked in *Link v. Wabash R.R.*,[72] a client voluntarily selects his attorney as his representative in an action, and, therefore, "cannot

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67. FED. R. CIV. P. 16(f).
68. 848 F.2d 1415, 1420.
69. 115 F.R.D. 44, 46 (E.D. Ky. 1987).
70. 848 F.2d 1415, 1420.
71. *Id.* at 1420-21 (citing Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962)).
72. Link v. Wabash R.R., 370 U.S. 626 (1962).

. . . avoid the consequences of the acts or omissions of [his] freely selected [counsel]."[73] Furthermore, as the panel majority argues:

> If a represented party does choose to appear and participate at a pretrial conference, Rule 16(f) demands that the party be a help and not a hindrance; he must be prepared to participate and participate in good faith. But nothing in Rule 16(f) specifically authorizes a district court to order a represented party to appear at a settlement conference.[74]

The dissent to the panel decision contended that the authority to convene a settlement conference is an empty power if it does not allow the court to require the presence of the parties themselves.[75] According to this dissent, the policy behind Rule 16 presupposes the authority of the court to require represented parties to attend a settlement conference.[76] Yet, as noted above, if the drafters believed such power to be essential to the fulfillment of the purpose(s) behind Rule 16, one would assume that the drafters would have incorporated such language into the Rule. Like the en banc majority, the panel's dissent presents no reason why the drafters would omit such important words.

Confining the district court's powers to compelling only attorneys of record and pro se litigants does not, as the dissent to the panel decision contends, nullify the impact of Rule 16. The district court clearly possesses the power under Rule 16 to order the attorney of a represented party or an unrepresented party to appear at a pretrial conference to discuss, among other subjects, the possibility of settlement. In addition, the court possesses the power to sanction the unrepresented party and both the attorney of a represented party and the party itself for failure to obey such pretrial orders. Even without the presence of the represented party, the conference enables the judge to get a feel for the issues in the case, and enables the parties to state their positions and explore the possibilities of settlement. The attorney of the represented party serves as an agent of that party. As such, one must assume that he will operate in the best interests of the client and according to the desires of the client. The attorney will convey any settlement offer made by the opposing party to his client, and he will likely explore the advantages and disadvantages of accepting the offer. The lawyer will fully apprise his client of the substance of the proceedings, discussing at some length the tenor of the proceedings and his perceptions of the strength of the client's position.[77] He will urge the client to accept a settlement offer if he feels his client has a

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73. *Id.* at 633-34.
74. 848 F.2d 1415, 1421.
75. *Id.* at 1426 (Flaum, J., dissenting).
76. *Id.*
77. 871 F.2d 648, 667 (Manion, J., dissenting).

poor chance of faring better at trial. The ultimate decision, however, remains with the client, who possesses the same or "similar" knowledge as those in attendance at the settlement conference, albeit secondhand.[78]

The dissent to the panel decision labels the authority to convene a settlement conference under Rule 16 a "hollow authority" in the absence of the power to compel the presence of the parties themselves.[79] The dissent states that settlement conferences are often unproductive unless all of the necessary parties are present and have full authority to settle the case.[80] This argument presumes that secondhand knowledge lends itself less toward encouraging settlement than does the firsthand information gleaned from attendance at the conference. The judge cites no empirical evidence to support this supposition. Recent studies of small claims mediation and adjudication in Maine and Ontario support the argument of the panel's dissent, showing consistently and strikingly higher rates of voluntary compliance with resolutions reached through mediation.[81] Others analyzing these statistics attribute the higher rate of compliance in mediation to the nature of the dispute and the type of forum.[82]

An analysis of the *Heileman* situation leads one to believe that compelling an unwilling litigant to attend a settlement conference is less likely to result in settlement than is a settlement conference attended by only attorneys of record and unrepresented parties. First, an unwilling litigant forced to attend the settlement conference at considerable time and expense will be less amenable to compromise than before being forced to attend. The prospective litigant will see the conference as an unwarranted imposition on his valuable time, rendering him more hostile to settlement. The effectiveness of the settlement conference will likely be hindered by the forced presence of a represented party, who spends the entire conference thinking his time could be more valuably spent elsewhere.

The party's objectivity will be clouded by the adverse emotions arising from past dealings with the other party. Two attorneys removed from the passions of the situation can more objectively discuss the situation. After attending the conference, the attorney can present his view or estimate of the situation to the client. The client will be more agreeable to the suggestion of settlement when removed from the direct exposure to his oppo-

78. 848 F.2d 1415, 1419-20.
79. *Id.* at 1423 (Flaum, J., dissenting).
80. *Id.*
81. N. ROGERS & C. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE 22 n.41 (1989) (citing McEwen & Maimen, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 45-47 (1984)).
82. *Id.* at 22-23 n.41 (citing Roehl & Cook, *Issues in Mediation: Rhetoric and Reality Revisited*, 41 J. SOC. ISSUES 161, 163-64 (1985)).

nent and the emotions induced by such exposure. He will weigh the situation more rationally, accepting a settlement offer which he might have refused if confronted directly with the offer by the party in opposition.

## VI. Speed and Efficiency vs. Justice

While the above suppositions rest upon observations of human nature, the case law also invalidates the position of the en banc majority. The Supreme Court initially adopted a deferential attitude toward the district court's authority to use pretrial procedures to orderly and expeditiously dispose of a case. In *Link v. Wabash R.R.*,[83] the Court affirmed the lower court's sua sponte dismissal of the plaintiff's complaint with prejudice due to the failure of the plaintiff's counsel to appear at a pretrial conference as ordered by the lower court pursuant to local rule. The attorney informed the judge on the morning of the conference that he would be unable to attend it due to his workload. When the attorney failed to show for the conference, the judge exercised his "inherent powers," dismissing the suit for failure to prosecute.[84] The Court affirmed the district court's authority under its inherent powers to dismiss a case sua sponte for failure to prosecute, emphasizing the court's broad discretion in ordering such dismissals.[85]

Numerous appellate decisions, left untouched by the Supreme Court, qualify its initial deference. The district court's actions in *Link* fall squarely within the authority subsequently extended to the district courts by Rule 16. Yet, Justice Black cautioned in *Link* against seeking to reduce the congestion present in court dockets in any way which "undercuts the very purposes for which courts are created — that is, to try cases on their merits and render judgments in accordance with the substantial rights of the parties."[86]

The Fourth Circuit heeded Justice Black's warning in *McCargo v. Hedrick*,[87] abandoning this traditionally deferential approach to strike down in its entirety a pretrial rule of the Northern District of West Virginia. The rule seemed innocent on its surface, requiring only that opposing counsel "confer and . . . meaningfully and effectively express and commit themselves in a written statement on matters and issues involved in and controlling determination of the action."[88] The court ruled that

83. 370 U.S. 626 (1962).
84. *Id.* at 629.
85. Peckham, *supra* note 14, at 791.
86. 370 U.S. 626, 648.
87. 545 F.2d 393 (4th Cir. 1976).
88. McCargo v. Hedrick, 545 F.2d 393, 394 (4th Cir. 1976).

the numerous, greatly detailed "implementation" provisions, administered by a magistrate who ordered even more specific amendments to plaintiff's proposed pretrial order, rendered plaintiff's compliance with the rule virtually impossible.[89] The magistrate dismissed the case sua sponte with prejudice when the plaintiffs failed to file a third amended pretrial order. Plaintiffs' failure to file, however, resulted from defendant's refusal to produce the requested lists of documentary evidence.[90] Stating that "local rules are not a source of power but are instead a manifestation of it,"[91] the Fourth Circuit held that the local rule was void as inconsistent with Rule 16.[92] While willing to grant the district court the discretion to develop pretrial procedures, the Fourth Circuit would not permit the unfettered use of such discretion in a manner that effectively restricts the accessibility of the courts to those with meritorious claims.

In a similar vein, the Seventh Circuit ruled in *Identiseal Corp. of Wisconsin v. Positive Identification Systems, Inc.*[93] that Rule 16 by its terms does not confer upon a district court the authority to compel litigants to obtain admissions of fact and of documents even if it is clear that such admissions would simplify the trial. In its analysis, the court expressly stated that the court's discretion under Rule 16 is limited.[94] The rule only requires the attorneys for the parties, or a member of an unrepresented party, to attend the conference for the purpose of considering the possibility of admissions. The Seventh Circuit refused to uphold the sanctions and dismissal of the suit, proclaiming that it would uphold the lower court's actions only if the plaintiff's failure to file a final pretrial report constituted a failure to prosecute.[95]

Likewise, in *J.F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp.*,[96] the Seventh Circuit previously recognized that while Rule 16 bestows broad discretion on the district courts, the discretion is by no means unlimited. The *Edwards* court ruled that Rule 16 does not authorize a district court to compel a stipulation of the facts and to level sanctions against the party when no stipulation is forthcoming.[97] The Seventh Circuit again established the failure to prosecute as the key un-

89. *Id.* at 396-401.
90. *Id.* at 395.
91. *Id.* at 402.
92. *Id.*
93. 560 F.2d 298 (7th Cir. 1977).
94. Identiseal Corp. of Wisconsin v. Positive Identification Systems, Inc., 560 F.2d 298, 302 (7th Cir. 1977).
95. *Id.*
96. 542 F.2d 1318 (7th Cir. 1976).
97. J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1325 (7th Cir. 1976).

locking the door to the judge's power to compel obedience to his requests and demands relating to pretrial conferences.

Under the Seventh Circuit's criteria in *Identiseal* and *Edwards*, Joseph Oat's action would not open the door to judicial sanction. Joseph Oat did send a representative to both conferences, albeit in the form of its trial and corporate counsel rather than a party member with full settlement authority. The fact that Joseph Oat manifested an unwillingness to pay any amount of money to achieve settlement does not constitute a failure to prosecute. If anything, this unwillingness to pay any monetary amount to effect settlement serves as a sign of Joseph Oat's readiness to proceed with the litigation. Furthermore, Joseph Oat's previous actions cannot be characterized as dilatory to the point of manifesting a failure to prosecute. Joseph Oat settled its differences with Heileman and dismissed its claim against RME. The fact that RME refused to drop its claims against Joseph Oat and that Joseph Oat indicated that it was not prepared to yield such claims cannot be considered a failure to prosecute under any circumstances.

The Seventh Circuit most recently stressed the limits of the district court's power under Rule 16 in *Strandell v. Jackson County*.[98] The parents of Michael Strandell brought a civil rights action against Jackson County, Illinois in reaction to the arrest, strip search, imprisonment, and suicidal death of their son. In anticipation of a pretrial conference, the plaintiffs filed a written report concerning settlement prospects, reporting that they were requesting $500,000 and the defendants had refused to discuss the issue.[99] At the pretrial conference, the district court suggested that the parties consent to a summary jury trial.[100] The plaintiffs refused to participate in a summary jury trial, filing a motion to advance the case for trial. The district judge subsequently set the case for trial. Prior to the scheduled date, the district court again discussed settlement prospects with counsel, expressing its view that a trial could not be accommodated due to its crowded dockets.[101] The judge again requested that the parties submit to a summary jury trial. Plaintiffs again refused to participate in such proceeding, announcing their desire to proceed to

98. 838 F.2d 884 (7th Cir. 1987).

99. *Id.* at 884.

100. A summary jury trial generally lasts one day, and consists of the selection of six jurors to hear approximations by counsel of the expected evidence. After receiving an abbreviated charge, the jury retires with directions to render a consensus verdict. After a verdict is reached, the jury is informed that its verdict is advisory in nature and nonbinding. The objective of this procedure is to induce the parties to negotiate a settlement. *See* Lambros, *Report to The Judicial Conference of the United States, reprinted at* 103 F.R.D. 461 (1984).

101. 838 F.2d 884, 884-85.

trial immediately. Counsel for plaintiffs justified the decision, stating that the summary jury trial would require disclosure of privileged statements to which the judge had earlier denied defendants access during discovery. The district court rejected this argument, ordering the parties to participate in a summary jury trial.[102] Refusing to proceed with the summary jury trial, plaintiff's counsel was held in criminal contempt. Counsel thereafter filed a notice of appeal.[103]

Acknowledging the district court's power to control and manage its docket, the Seventh Circuit cautioned that such power must be exercised in harmony with the Federal Rules of Civil Procedure as such rules reflect a careful process of study designed to balance the need for expedition of cases and the protection of individual rights. Innovation by the individual judicial officer must conform to the balance between the needs for judicial efficiency and the rights of the individual litigant as promulgated by the Supreme Court and Congress.[104] The Seventh Circuit overruled the district judge's order, holding that the federal district court may not require litigants to participate in a nonbinding summary jury trial. In so doing, the *Strandell* court emphasized the limits of judicial power under Rule 16:

> In our view, while the pretrial conference of Rule 16 was intended to foster settlement through the use of extrajudicial procedures, it was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation. The drafters of Rule 16 certainly intended to provide, in the pretrial conference, "a neutral forum" for discussing the matter of settlement. However, it is also clear that they did not foresee that the conference would be used "to impose settlement negotiations on unwilling litigants. . . " While the drafters intended that the trial judge "explor[e] the use of procedures other than litigation to resolve the dispute," - including "urging the litigants to employ adjudicatory techniques outside the courthouse," - they clearly did not intend to require the parties to take part in such activities.[105]

The Seventh Circuit, thus, clearly expressed a theme running throughout its earlier cases concerning the limits of judicial power under Rule 16: speed and judicial efficiency should not be sought at the expense of justice or due process.

The dissent to the panel decision in *Heileman* contends that the majority improperly relies upon *Strandell* to support its position. According to Judge Flaum, the holding in *Strandell* is very narrow, overruling the

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102. *Id.*
103. *Id.*
104. *Id.* at 886-87.
105. *Id.* at 887 (quoting FED. R. CIV. P. 16 advisory committee's note) (emphasis omitted).

district judge's actions because Rule 16 does not expressly provide for summary jury trials.[106] Yet, the broad language used by the *Strandell* court does not limit itself to this reading. The Seventh Circuit clearly stated that while it recognized the need for the district judge to control his docket, "a crowded docket does not permit the court to avoid the adjudication of cases properly within its congressionally-mandated jurisdiction."[107] The Seventh Circuit thus recognized a problem explored by many advocates and nonadvocates of alternative dispute resolution: "speed and superficial lack of expense are, in and of themselves, incomplete answers."[108]

## VII. Intent to Encourage or Coerce Settlement?

In *Kothe v. Smith*,[109] the Second Circuit ruled that the failure of a physician to offer to settle a malpractice claim for $20,000, despite the district court's urging, did not warrant the imposition of sanctions against the physician even though he settled for such an amount after one day of trial. Although the Second Circuit gave much weight in its analysis to the fact that the patient never demanded less than $50,000 or indicated any inclination to settle for any amount in the area of $20,000, its pronouncement that Rule 16(c)(7) was designed to encourage pretrial settlement discussions and not to impose settlement negotiations on unwilling parties indicates the court's reasons for overturning the district court's actions.[110] The drafters noted in the advisory committee notes to the 1983 amendments that the purpose of Rule 16(c)(7) is not to "impose settlement negotiations on unwilling litigants,"[111] but to provide a neutral forum for discussing the subject. Under the Second Circuit analysis, the judge possesses the power to foster settlement negotiations and to encourage them in any manner possible so long as the judge's actions do not amount to an imposition of settlement negotiations on unwilling litigants. Under this analysis, the magistrate's actions in *Heileman* would certainly be outside the limits of his discretion. Although it might be argued that forced attendance does not constitute forced negotiations, one would consider it inconceivable that to order an unwilling litigant to

106. 848 F.2d 1415, 1425 (Flaum, J., dissenting).

107. 838 F.2d 884, 888 (citing Thermtron Products v. Hermansdorfer, 423 U.S. 336, 344 (1976)).

108. Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 546 (1986). *See also* Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement conference*, 33 UCLA L. REV. 485 (1985).

109. 771 F.2d 667 (2d Cir. 1985).

110. Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985).

111. FED. R. CIV. P. 16 advisory committee's note.

expend the time and to incur the expense of flying from Pennsylvania to Wisconsin to attend a pretrial settlement conference does not amount to the imposition of settlement. Judge Posner in his dissent labeled the magistrate's continued insistence on Joseph Oat's sending an executive to Wisconsin "arbitrary, unreasonable, willful, and indeed petulant."[112] This characterization is especially true in light of the magistrate's knowledge that Joseph Oat could not negotiate a settlement even if it wished to because of its insurer's refusal to pay any amount in settlement.

Perceiving the likelihood of judicial abuse, the drafters warned against the use of judicial power under Rule 16 to coerce settlement. The en banc majority argues that requiring a represented party to attend a settlement conference does not amount to coercing settlement. According to the majority, while a magistrate cannot force litigants to settle their disputes, he can require an unwilling represented party to participate in settlement negotiations in good faith.[113] The majority's arguments, however, fail to take notice of the economics of the situation. First, the poorer of the parties may be less able to collect and analyze the information essential to predict the outcome of the litigation, and thus be disadvantaged in the settlement process. Second, the party may need the damages sought immediately and thus be induced to settle in order to accelerate payment, even though realizing that he might receive more if he waits for a judgment. Third, the poorer party might be forced to settle because he lacks the money to finance the litigation, to cover either his own expenses or those imposed by his opponent through the misuse of procedural mechanisms such as discovery.[114] While Joseph Oat is likely to be neither so unsophisticated nor so poor as to resemble a sitting duck during the settlement conference, exigent financial circumstances are in existence which make the magistrate's order and subsequent sanctions coercive in nature. First, Joseph Oat is at a financial disadvantage which could work against it in the settlement process in that the corporation's liability insurer flatly refuses to pay any sum of money to settle the case. Joseph Oat, thus, enters any settlement conference uncertain of its financial position and of the likelihood of indemnification from its insurer. Joseph Oat, therefore, might be tempted to settle for an amount which its available resources could cover, fearing an adverse judgment of a more exorbitant amount which its insurer might not be forced to cover. Second, attendance at the settlement conference by a party representative possessing full settlement authority gives rise to costs which might pose an undue burden on the party. Joseph Oat would certainly incur

112. 871 F.2d 648, 658 (Posner, J., dissenting).
113. *Id.* at 653-54.
114. Fiss, *supra* note 15, at 1076.

monetary costs in flying its representative to and from Wisconsin for a settlement conference in which, due to its liability insurer's proclamation, it was financially constrained from participating. Furthermore, only those executives positioned at the upper rungs of the corporate ladder would possess the mandated settlement authority. Their time is both valuable and limited. Requiring those executives to attend the settlement conferences places an extra burden on the party, which makes settlement increasingly attractive.

Requiring a represented party to attend a settlement conference is coercive in other manners as well. Pretrial conferences are less visible and usually unreviewable, bestowing more authority upon trial courts while at the same time providing litigants with fewer procedural safeguards to protect them from abuse of that authority.[115] "Judges are very powerful people; they decide contested issues, and they alone can compel obedience by the threat of contempt."[116] As a result, those subject to judges' authority challenge it at considerable risk.

Very few institutional constraints bind the judge or magistrate during the pretrial phase of litigation. According to Judith Resnik, the judge possesses considerable power in the pretrial stages of litigation. During pretrial supervision, judges make decisions informally, in chambers and without the presence of a court reporter, and often meet with parties ex parte.[117] Appellate review is virtually unheard of during this phase of litigation. Moreover, these judicial acts rarely encounter public scrutiny. As a result, parties are often better off to capitulate to judicial pressure to settle rather than risk the hostility of a judge who, under the individual calendar system, possesses ongoing responsibility for the case.[118]

By making the judge both adjudicator and manager, one substantially expands the opportunities for judges to use — or abuse — their powers.[119] An attorney familiar with the power and politics of the courtroom can more effectively resist the judge and reason with him than the client, who, unaccustomed to the games of the courtroom, will likely either irritate the judge through a perceived lack of deference or capitulate in awe of the judge's power. The client is also less likely to be aware of when the judge has stepped outside the bounds of his authority. While the presence of the party's attorney partially alleviates these problems, it cannot completely dispel them as the party still faces the overwhelming power of the court in an unknown situation. The magistrate's attitude

115. Resnik, *supra* note 1, at 424-26.
116. *Id.* at 425.
117. *Id.* at 413.
118. *Id.*
119. *Id.* at 425.

towards Joseph Oat, as indicated by his refusal to give credence to the corporation's constraints, clearly calls into question his impartiality. Joseph Oat would certainly take into consideration the court's previously uncompromising attitude when deciding whether to settle.

## VIII. JUDICIAL EFFICIENCY: A BY-PRODUCT OF THE MANDATORY SETTLEMENT CONFERENCE?

While the opponents of managerial judging concentrate upon perceived flaws in the fairness of the practice, focusing on its possible coerciveness, its proponents stress the increase in judicial efficiency wrought by the technique. Advocates of managerial judging assume that case management enhances efficiency in three ways: decreased delay, increased dispositions, and reduced litigation costs.[120] Yet, little empirical evidence supports the claim that judicial management "works" either to settle cases or to provide cheaper, quicker, or fairer dispositions.

Maurice Rosenberg completed the first systematic study of pretrial conferences, focusing on mandatory conference, voluntary conference, and nonconference cases in New Jersey.[121] That study reported findings, as of yet uncontroverted, that the mandatory pretrial conferences actually impaired the efficiency of the court by consuming judges' time in handling conferences, rather than trying cases. The judge's time constitutes the most expensive courthouse resource.[122] "Rather than concentrate all their energy deciding motions, charging juries, and drafting opinions, managerial judges must meet with parties, develop litigation plans, and compel obedience to their new management rules."[123] A study by the Federal Judicial Center supports Rosenberg's findings, revealing that courts with the greatest settlement activity experience the slowest rate of case terminations, or conversely, the "faster" courts were those that minimized judicial involvement in settlement.[124] Further, Rosenberg's study shows that cases submitted to mandatory pretrial conferences possessed no greater likelihood of resulting in settlements than those not so submitted. Settlement rates remained fairly consistent

120. *See* S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN THE U.S. DISTRICT COURTS (1977); Brazil, *Improving Judicial Controls over the pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 873 (1981) (discussing management of pretrial discovery).

121. *See* M. ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964).

122. Resnik, *supra* note 1, at 423 (citing J. KAKALIK & A. ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING TORT CASES 64 (1982) (annual costs of each federal judge estimated to be $752,000)).

123. Resnik, *supra* note 1, at 423-24.

124. *See* S. FLANDERS, DISTRICT COURT STUDIES PROJECT INTERIM REPORT (1976).

across all three types of cases studied.[125] By implication, therefore, judicial settlement management may indeed be an inefficient use of judicial time as management may require judges to supervise lawsuits that would have ended of their own accord, lawsuits that otherwise would fail to consume any judicial resources.[126]

The *Heileman* case clearly represents an inefficient use of court resources under the guise of managerial judging. Despite knowledge of Joseph Oat's inability to settle the case, the magistrate ordered a number of settlement conferences. Moreover, when Joseph Oat failed to send a party member with full settlement authority, he conducted the conferences anyway, refusing to allow Joseph Oat's attorney to participate in the discussions. As a definite settlement could not be reached without the agreement of Joseph Oat, further conferences were necessary. The judge, therefore, wasted not only the court's time, but also that of the parties. Yet, even with full awareness of Joseph Oat's circumstances, the magistrate scheduled another conference, ordering Joseph Oat to send a member with full settlement authority. When Joseph Oat again failed to send such a person, the magistrate resorted to contempt proceedings to coerce Joseph Oat's attendance. A series of trials contesting the legitimacy of the contempt holding then ensued. While Joseph Oat ultimately settled its claims with Heileman in December of 1985, the litigation spawned by the magistrate's order continued into 1988 when the Seventh Circuit rendered its en banc decision. The magistrate would have saved numerous court resources had he originally given consideration to Joseph Oat's predicament and proceeded with the trial.

## IX. CONCLUSION

Managerial judging can improve the quality of trial proceedings,[127] but even its proponents recognize that it must be used judiciously.[128] Employed in the right case in the correct manner, managerial judging can result in a quick, efficient, and just result. Judges must, however, remain alert to the limits of their power in the settlement process. "A judge should, of course, be wary of appearing to coerce settlement, either by using overly burdensome pretrial procedures as a bludgeon or by be-

125. M. ROSENBERG, *supra* note 122, at 45-50.

126. Resnik, *supra* note 1, at 424; Menkel-Meadow, *supra* note 109, at 494.

127. M. ROSENBERG, *supra* note 122, at 45-50.

128. Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 328 (1986).

coming overly involved in the settlement process."[129] Quantity should not be won at the expense of quality.

Given the above guidelines, the magistrate in *Heileman* clearly abused his power. Due to financial constraints, Joseph Oat could not settle at any price. Despite full knowledge of Joseph Oat's predicament, the magistrate attempted to force the party to participate in the settlement conference at great expense in terms of both time and money, resorting to contempt proceedings when all else failed. The same danger exists whenever a judge takes it upon himself to order not only the lawyer of a represented party but also a party member with full settlement authority to attend settlement discussions. These parties must pay not only their attorney fees, but also expend their own time and money to attend the conference. The drafters of Federal Rule of Civil Procedure 16 recognized this potential for coercion.[130] With this in mind, they drafted the Rule so as to limit the judge's power to ordering an unrepresented party or the attorney of a represented party to attend the settlement conference. In some circumstances, changes in incentives as a result of managerial judging may promote just outcomes. These changes, however, should not be wrought at the expense of procedural justice. Are settlements achieved under conditions of imbalance, indeterminacy, and judicial coercion any better than adjudication reached under similarly disturbing circumstances?

*Susan Kaye Antalovich*

129. Peckham, *supra* note 14, at 788.
130. FED. R. CIV. P. 16 advisory committee's note.